

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill increases DEP workload by authorizing DEP to adopt rules related to the trading of water quality credits for industries within a BMAP; by authorizing DEP to revise a water pollution operation permit under certain circumstances; and by authorizing DEP to revise, renew, issue, or reissue such a permit if a water quality credit trade that meets the requirements of a TMDLs allocation has been approved in a final order issued pursuant to state law. However, the bill also creates that water quality credit trading program that is a voluntary, market-based approach to promote the protection and restoration of Florida's rivers, lakes, streams and estuaries and would enhance the other voluntary, regulatory and financial assistance programs already in place.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

The federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act (CWA), established the basic framework for pollution control in the nation's water bodies. Its primary goal was to have the nation's water bodies clean and useful. By setting national standards and regulations for the discharge of pollution, the CWA was intended to restore and protect the health of the nation's water bodies. Section 305(b) of the CWA requires states to submit to Congress a biennial report on the water quality of their lakes, streams, and rivers. A partial list of water bodies that qualify as "impaired" (i.e., do not meet specific pollutant limits for their designated uses) must be submitted to the U.S. Environmental Protection Agency (EPA) under section 303(d) of the CWA. States are required to develop TMDLs for each pollutant that exceeds the legal limits for that water body. The 303(d) list is updated every two years. The list sets a prioritized schedule for TMDL development for all water bodies on the list. The scope of this process is enormous since Florida has about 52,000 miles of rivers and streams, nearly 800 lakes, 4,500 square miles of estuaries, and more than 700 springs.

Florida Watershed Restoration Act

Total Maximum Daily Loads

In 1999, the Florida Legislature passed the Florida Watershed Restoration Act (WRA) which codified the establishment of TMDLs for pollutants of water bodies as required by the federal CWA. The WRA required DEP to promulgate rules relating to the methodology for assessing, calculating, allocating, and implementing the TMDL process. The WRA also directed that the TMDL process be integrated with existing protection and restoration programs, and coordinated with all state agencies and affected parties.

TMDLs establish the amount of each pollutant a water body can receive without violating state water quality standards. TMDLs are characterized as the sum of waste load allocations, load allocations, and a margin of safety to account for uncertain conditions. *Waste load allocations* are pollutant loads attributable to existing and future point sources, such as discharges from industry and sewage facilities. *Load allocations* are pollutant loads attributable to existing and future nonpoint sources such as the runoff from farms, forests, and urban areas. Even though an individual discharge into a water body may meet established standards, the cumulative and multiplier effect of discharges from numerous sources can cause a water body to fail to meet quality water standards.

Basin Management Action Plan

DEP develops BMAPs as part of the development and implementation of a TMDL for a water body. First the BMAP establishes a pollution allocation. Then the BMAP establishes the schedule for implementing projects and activities to meet the pollution reduction allocations, the basis for evaluating the plan's effectiveness and making adaptive changes, and funding strategies. The BMAP represents the opportunity for local stakeholders, including affected dischargers, local government and community leaders, and the general public to collectively determine and share water quality clean-up responsibilities. DEP works with stakeholders to develop effective BMAPs, which then must be adopted by Secretarial order pursuant to s. 403.067(7), F.S.

When one pollutant source determines that there may be a lower cost alternative for achieving its required reductions; and the alternative requires the assistance of another pollutant source or sources, a potential market is created. It is the BMAP process and the adoption of formal, inter-related pollution reduction requirements that create the conditions where market exchanges become more likely.

BMAPs must include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time. An assessment of progress toward these milestones must be conducted every five years, and revisions to the plan must be made as appropriate.

TMDL Implementation and Permitting

DEP is the lead agency in coordinating the implementation of the TMDLs through existing water quality protection programs. Applications of a TMDL by a water management district must be consistent with s. 403.067, F.S., and may not require the issuance of an order or a separate action pursuant to chapter 120, F.S., for the adoption of the calculation and allocation previously established by DEP. Such programs include:

- Permitting and other existing regulatory programs, including water-quality-based effluent limitations;
- Nonregulatory and incentive-based programs, including best management practices (bmps) cost sharing, waste minimization, pollution prevention, agreements established pursuant to s. 403.061(21), F.S., and public education;
- Other water quality management and restoration activities;
- Public works including capital facilities; or
- Land acquisition

A nonpoint pollutant source discharger included in a BMAP must demonstrate compliance with the established pollutant reductions by either implementing the appropriate BMPs or by conducting water quality monitoring. A nonpoint source discharger may be subject to enforcement action by DEP or a water management district based upon a failure to implement these responsibilities.

Provisions of a BMAP must be included in subsequent NPDES permits. DEP is prohibited from imposing limits or conditions on implementing an adopted TMDL in a NPDES permit until the permit expires, the discharge is modified, or the permit is reopened pursuant to an adopted BMAP.

NPDES permits issued between the time a TMDL is established and a BMAP is adopted contain a compliance schedule allowing time for the BMAP to be developed. Once the BMAP is developed, a permit will be reopened and individual allocations consistent with the BMAP will be established in the permit. The timeframe for this to occur cannot exceed 5 years. NPDES permittees may request an individual allocation during the interim and DEP may include an individual allocation in the permit.

Water Quality Credit Trading

Water quality credit trading is a voluntary, market-based approach to promote protection and restoration of Florida's rivers, lakes, streams and estuaries and would supplement and enhance the other voluntary, regulatory and financial assistance programs already in place. Trading is based on the fact that businesses and industries, wastewater treatment facilities, urban stormwater systems, and agricultural sites that discharge the same pollutants to a waterbody (basin, watershed or other defined area) may face substantially different costs to control those pollutants. Trading allows pollutant reduction activities to be environmentally valued in the form of "credits" that can then be traded on a local "market" to promote cost-effective water quality improvements.

The purpose of water quality credit trading is to promote more effective, lower cost reductions of pollutants in order to restore Florida's surface waters. Financial savings will accrue to parties that buy trading credits (pollutant reductions) from others for less than the cost of implementing the reductions themselves; those that sell credits will do so only if the value of the trade is equal to or higher than their investment in the facilities or activities necessary to achieve the pollutant reductions. Credits are not in any sense a right to pollute; they are solely an accounting mechanism to establish and verify the market exchange of effective pollutant reduction actions.

The Florida Legislature directed DEP, no later than November 30, 2006, to report to the Governor, the President of the Senate, and the Speaker of the House of Representatives with recommendations on water quality credit trading. While there is no right to pollute under Florida law and thus no "pollutant rights" to be traded, the investments in infrastructure and management activities to reduce pollution and protect water quality represent "commodities" that can be traded to achieve mutually beneficial, cost-effective outcomes.

Section 403.067(8), F.S., authorizes the DEP to adopt various rules related to restoring surface water quality in Florida, including the general content of trading rules in paragraph (c):

Procedures for pollutant trading among the pollutant sources to a water body or water body segment, including a mechanism for the issuance and tracking of pollutant credits. Such procedures may be implemented through permits or other authorizations and must be legally binding. Prior to adopting rules for pollutant trading under this paragraph, and no later than November 30, 2006, the Department of Environmental Protection shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives containing recommendations on such rules, including the proposed basis for equitable economically based agreements and the tracking and accounting of pollution credits or other similar mechanisms. Such recommendations shall be developed in cooperation with a technical advisory committee that includes experts in pollutant trading and representatives of potentially affected parties.

DEP consulted extensively with a Pollutant Trading Policy Advisory Committee (PTPAC) comprising expertise from regulated interests, environmental organizations, water management districts, and local governments, and submitted the required report in December 2006.

Within this report, DEP provided its recommendations for the statutory and rule changes necessary to promote an effective trading program, including:

- Basic foundational authority to create and implement a trading program that can effectively account for the environmental value of trading pollutant reduction actions and assure their enforceability (statutory).
- Formal trading should take place only where BMAPs—detailed water quality clean-up plans, including implementation schedules and financing options—have been publicly adopted (statutory).

- Trades should be incorporated into permits, BMAPs, certifications, or other binding mechanisms that assure the enforceability required by the Watershed Restoration Act (statutory).
- An existing, outmoded form of public interest test (so-called “equitable abatement”) should be limited to areas where a BMAP has not yet been adopted and a new, more effective public interest test should be established for areas where a BMAP has been adopted (statutory).
- The limitation that administrative orders, a legal compliance mechanism, may only be issued with permits and permit renewals should be expanded so that these orders may also be issued with permit revisions and modifications, which would be used to sanction trades and the reasonable implementation schedules necessary for reducing pollutants (statutory).
- Mechanisms for and limitations on credit generation (rule).
- Credit adjustment factors, including location and uncertainty factors, to reflect that some technologies and activities are more effective at reducing pollutants than others, but that trading may still take place when this fact is appropriately accounted (rule).
- Establishment of a credit tracking registry to account for the environmental value of credits and their exchanges in the trading market (or markets), without assessing the shifting monetary value of credits and, thus, leaving proprietary and privacy issues to be addressed between trading parties (rule).¹

Effect of Proposed Changes

The bill requires BMAPs for specified basins to allow point or nonpoint sources that will achieve greater pollutant reductions than required by an adopted TMDL or wasteload allocation to generate, register, and trade water quality credits for the excess reductions to enable other sources to achieve their allocation if the generation of water quality credits does not remove the obligation of a source or activity to meet applicable technology requirements or adopted bmps. The plans must also allow trading between NPDES permittees, and trading that may or may not involve NPDES permittees, where the generation or use of the credits involve an entity or activity not subject to DEP water discharge permits whose owner voluntarily elects to become subject to requirements of s. 403.067, F.S. The bill only authorizes trading in BMAPs for the Lower St. Johns River Basin, Tampa Bay Basin, and Pensacola Bay Basin.

Rulemaking for the trading must be initiated by July 1, 2008 and must include the following:

1. The process to be used to determine how credits are generated, quantified, and validated;
2. A publicly accessible water quality credit trading registry that tracks water quality credits and trades and lists the prices paid for such credits. The DEP is not permitted to participate in the establishment of such prices;
3. Limitations on the availability and use of water quality credits, including a list of eligible pollutants or parameters and limited water quality requirements and, where appropriate, adjustments to reflect BMP performance uncertainties and water-segment-specific location factors;
4. The time and duration of credits and allowance for credit transferability; and
5. Mechanisms for determining and ensuring compliance with trading procedures, including recordkeeping, monitoring, reporting, and inspections. Generators of traded credits are responsible for achieving the load reductions on which the credits are based.

¹ DEP Water Quality Credit Trading Report, December 2006,

http://www.dep.state.fl.us/water/tmdl/docs/WQ_CreditTradingReport_final_December2006.pdf

The bill also requires any amendment to a BMAP to be adopted by secretarial order pursuant to chapter 120, F.S., including amendments necessary to implement the provisions of the trading program.

The bill provides that DEP's rule relating to the equitable abatement of pollutants into surface waters may not be applied to BMAPs where water quality credit trading occurs.²

The DEP must provide an annual report to the Legislature on the status of the trading program.

For discharges that will not meet permit conditions or applicable statutes and rules, the bill authorizes DEP to revise a water pollution operation permit under certain circumstances and authorizes DEP to revise, renew, issue, or reissue such a permit if a water quality credit trade that meets the requirements of a TMDLs allocation has been approved in a final order issued pursuant to state law. The bill requires that revised permits be accompanied by an order establishing a schedule for achieving compliance with all permit conditions.

C. SECTION DIRECTORY:

Section 1. Amends s. 403.067, F.S., providing requirements for BMAPs; allowing such plans to take into account the benefits of pollutant load reduction achieved by point or nonpoint sources; requiring that DEP adopt all or part of any such plan, or any amendment by secretarial order as provided by state law; providing that the provisions of DEP's rule relating to the equitable abatement of pollutants into surface waters may not be applied to water bodies or water body segments for which a BMAP that takes into account future or new expanded activities or discharges has been adopted; authorizing water quality protection programs to include the trading of water quality credits; authorizing DEP to adopt rules related to the trading of credits; requiring that such rulemaking include certain provisions; specifying basins within which the trading of water quality credits shall be authorized; requiring that DEP provide the Legislature with an annual report regarding the status of the trading program; correcting cross-references to conform to changes made by the act.

Section 2. Amends s. 403.088, F.S.; authorizing DEP to revise a water pollution operation permit under certain circumstances; authorizing DEP to revise, renew, issue, or reissue such a permit if a water quality credit trade that meets the requirement of a TMDL allocation has been approved in a final order issued pursuant to state law; requiring that revised permits be accompanied by an order establishing a schedule for achieving compliance with all permit conditions.

Section 3. Provides the act take effect July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

DEP estimates rulemaking to cost about \$20,000 and a database system for the registry to cost about \$200,000.

² Equitable Abatement Rule, Section 62-4.242, F.A.C.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

Water quality credit trading has the potential to reduce the costs of pollutant reduction activities to local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The following comments were provided by DEP:

1. Direct Private Sector Costs: The cost to any private entity, such as a utility of agricultural operation, would depend on whether it chose to invest in a project or activity designed to generate water quality credits—that is, additional pollution reduction benefits beyond their minimum requirements—for trading to other sources of pollution. Such an investment would certainly have a cost but, presumably, would not be made unless the long term economic benefit to be derived outweighed that cost.

2. Direct Private Sector Benefits: Trading has the potential to reduce the costs of pollutant reduction activities to businesses, industries, agriculture, and all taxpayers. It is a market-based program under which participants will seek lower cost alternatives to solving the water quality problem that must be solved in any event. Because the costs of pollution reduction will grow over time, cost savings could be significant, many of which would accrue to the private sector.

3. Effects on Competition, Private Enterprise and Employment Markets: The purpose of creating a water quality credit trading program is to allow entities facing higher pollution control costs to purchase environmentally equivalent or superior pollution reductions (credits) from other sources of the same pollutant that can achieve the necessary reductions at a lower cost. Such a market approach could certainly affect competition and employment depending on the local circumstances in a basin. Areas where private entities or local governments were more aggressive in taking advantage of trading opportunities could see increased construction of pollution abatement facilities, which typically generates a range of local job opportunities and economic transactions. In addition, some private entities would likely seek out situations where they could provide services, activities or facilities that would reduce pollution as part of a business arrangement. As the impacts would be basin-specific and would depend on determinations made by independently operating private entities and local governments, they cannot be predicted.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None

B. RULE-MAKING AUTHORITY:

The bill authorizes DEP to adopt rules related to the trading of water quality credits. The bill also authorizes DEP to revise a water pollution operation permit under certain circumstances and authorizes DEP to revise, renew, issue, or reissue such a permit if a water quality credit trade that meets the requirements of a TMDLs allocation has been approved in a final order issued pursuant to state law.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The following comments were provided by DEP:

DEP supports the bill. However, a number of amendments are necessary to address agency concerns:

The bill should be amended to limit water quality credit trading exclusively to the Lower St. Johns River basin at this time as a pilot project, in effect, to enable DEP to evaluate the implications of trading. The precedent conditions in this basin lend themselves to a timely pilot project. First, a Total Maximum Daily Load for nutrients has already been adopted, which establishes the overall pollutant reductions that need to take place. DEP has been working with stakeholders on the development of a Basin Management Action Plan for the river, targeted for completion in summer 2008, and opportunities for water quality trading have been important to the stakeholders during those discussions. There are 38 permitted wastewater sources in the basin, many of which have already expressed an interest in trading to meet their pollutant reduction obligations. There also are significant stormwater management problems in the Jacksonville area that may lend themselves to resolution through trading. DEP should be authorized to establish appropriate conditions for trading in the basin, to be publicly adopted in the Basin Management Action Plan, generally similar to those that ultimately will be further elaborated in a statewide rule.

Following on the previous recommendation, the bill also should require DEP to prepare a report for the Governor and Legislature on the Lower St. Johns River pilot project, including:

- A summary of how water quality credit trading was used in the pilot basin;
- A description of any conditions placed on trading;
- A description of the individual trades and their environmental value;
- A report on the prices associated with the trades, as reported by the traders; and
- A recommendation as to whether other areas of the state would benefit from water quality credit trading and, if so, an identification of the statutory changes necessary to expand the scope of trading.

The report should be required 24 months after the Basin Management Action Plan for the Lower St. Johns River has been adopted, which should be sufficient time to report on some if not all trading activities being undertaken to meet the pollutant reduction requirements in the area.

Some new water quality trading language (lines 71-93) is included with existing language concerning the allocation process within a Basin Management Action Plan. The language would be more logically located with other water quality credit trading language later in the bill in order to reduce confusion.

The bill should be amended to clarify the effect of water quality trades on existing permits. Each permit holder must remain responsible for compliance with its discharge permit limits, including its load or wasteload allocation. In addition it must be made clear, for permits that are issued by a federally authorized DEP program, that DEP has the authority to assure consistency between any trading actions and federal (EPA) regulatory requirements.

The bill should be amended to make water quality credit trading available to nonpoint source dischargers to supplement their ability to meet pollutant load reduction requirements through the implementation of best management practices.

Beyond the limitation to three basins, the bill restricts water quality credit trading to areas where there is an adopted Basin Management Action Plan. This is an appropriate but insufficient condition. There are cases where DEP will not adopt a Total Maximum Daily Load and associated Basin Management Action Plan under s. 403.067, F.S., because of the scope and progress of existing restoration programs in the area. In such cases, DEP develops a "Reasonable Assurance Document," in effect, to endorse the water quality improvements. This action has the same general effect as a Basin Management Action Plan in that it identifies the activities and programs necessary—indeed, already underway—to resolve local water quality problems. DEP recommends that the bill be amended to ensure that trading in the future, assuming successful completion of the Lower St. Johns River pilot project, may be authorized in areas where the reasonable assurance approach has been adopted in addition to those areas where a Basin Management Action Plan has been adopted.

The mechanisms for authorizing water quality credit trades should be clarified so that it is clear these may include permits, other authorizations, or other legally binding agreements.

Page 14, lines 376-378 establish that DEP will have no involvement in the establishment of prices for water quality credits but that it must list the prices paid for credits. This concept is acceptable but must be strengthened to include a direct requirement on all traders to report credit prices and how they were determined, including any subsidies received, to DEP.

DEP will work with the Governor's Office, bill sponsor and affected stakeholders on these amendments in order to make the water quality credit trading program more effective.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A